IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 979.

DANIEL F. BOONE, *Petitioner*,

v.

MARTHA LIGHTNER BOONE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND SUPPORTING BRIEF.

STUART H. ROBESON,
Investment Building,
Washington, D. C.,
Attorney for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Daniel F. Boone, by his attorneys, prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the District of Columbia, entered in the above cause on December 22, 1942, affirming the judgment of the District Court of the United States for the District of Columbia, entered on March 13, 1942 (R. 89).

OPINIONS BELOW.

The trial court wrote no formal opinion, but adopted findings of fact and conclusions of law in entering its Order (R. 27-28).

The opinion of the United States Court of Appeals for the District of Columbia (R. 81) in 76 App. D. C. —, — Fed. (2d) — (Adv. Sheets).

A timely petition for a rehearing was denied by the United States Court of Appeals for the District of Columbia, on December 22, 1942, (R. 83-89).

STATEMENT OF MATTER INVOLVED.

The petitioner, Daniel F. Boone, and the respondent, Martha Lightner Boone, are husband and wife. They have two children, Daniel L. Boone, born on May 23, 1935, and Martha Penelope Boone, born on September 14, 1938. The petitioner and respondent lived together as man and wife in the State of North Carolina until about April 13, 1939, when they separated (R. 6). They entered into a formal separation agreement on September 30, 1939, whereby the respondent (wife) gave to the petitioner (husband) the entire and absolute custody of their two children. The wife reserved to herself the right (if she so desired) of visitation on 2 days each month. The husband has had continuous custody of both children from September 30th, 1939, up to the present time (R. 16).

The appellant moved to the District of Columbia with both children on or about November 1, 1940, and established a home with them in this jurisdiction, he having entered the military service on or about that date. The children have resided with the petitioner in the District of Columbia since November 1, 1940, and have never returned to the State of North Carolina (R. 16).

On April 16, 1941, the petitioner, although actually residing in the District of Columbia, filed suit for a divorce from

the respondent in North Carolina. The respondent answered the said divorce suit, and requested in her answer that she be awarded partial custody of the children (R. 7-11). The divorce case came on for hearing in North Carolina on June 23, 1941, and the petitioner having received but one day's leave of absence from his official duties for this trial testified on June 23, 1941, in that case (R. 15). Petitioner had not completed his testimony on June 23, 1941, and he was required to return to his military duties in the District of Columbia; he left North Carolina on the evening of June 23, 1941, and immediately gave up his domicile in that state (R. 15). Thereafter, in the absence of the petitioner, who was on military duty, the trial court of North Carolina proceeded with the divorce case for several days and entered its interlocutory order on July 2, 1941, awarding complete custody of both children, who were not within the jurisdiction of the court, to the respondent. Although a trial was held on the issues of the divorce, (which was not contested) the order of the North Carolina Court makes no reference whatsoever to the divorce itself (R. 12-14), but is entitled merely an "Order Awarding Custody".

On February 6, 1942, the respondent filed her petition for a Writ of Habeas Corpus in the District Court of the United States for the District of Columbia, seeking the custody of the said children, alleging that petitioner was detaining them illegally, and had failed to obey the Order of the North Carolina Court of July 2, 1941, awarding to her the custody of the children (R. 2). The petitioner answered the writ of Habeas Corpus, wherein he denied the contentions of the respondent. Among other things, he stated in this answer that the Order of the North Carolina Court was not binding upon him; that it had no extraterritorial effect; that the children were not residents of North Carolina, nor, before the North Carolina Court when the Order was entered; that the respondent was not a fit custodian for the children (R. 14-21).

After hearing upon the Petition for the Writ of Habeas Corpus and the Answer thereto, the judge in the District Court of the United States for the District of Columbia, ruled that he would not, and could not, go behind the North Carolina Order of July 2, 1941 (R. 26). The trial judge in so ruling, erroneously stated that he was "bound by the terms of the final judgment" of the North Carolina Court (R. 23). He refused to permit the petitioner to offer any testimony as to the character of the respondent on the issue of her fitness to be custodian of the children occurring prior to the date of the Order of the North Carolina Court (R. 29-33).

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended by the act of February 13, 1925, which provides that certiorari should be granted:

> "Where the Court of Appeals of the District of Columbia has decided a question of general importance, or a question of substance relating to the construction or application of the constitution, or a treaty or statute of the U. S., which has not been, but should be, settled by this court, or where that court has not given proper effect to an applicable decision of this court."

The question of "substance" claimed by the petitioner, is, the denial to him of due process of law, as guaranteed by the Fifth Amendment of the Constitution of the United States, because of the failure of the court below to grant him a full and complete hearing, and in view of its erroneous decision in giving full faith and credit to the interlocutory of the North Carolina Court giving custody of the non-resident children to the respondent.

The court below stated in its opinion that the effect of *res judicata* could be given to the North Carolina Order, (R. 82) and for that reason it would not go behind the Custody Decree of that jurisdiction. It is our contention that the lower court in giving the effect of *res judicata* to the North

Carolina Decree, which is not a final order or decree, deprived the petitioner of due process of law as guaranteeed by the 5th Amendment of the Federal Constitution.

The judgment to be reviewed is the judgment of the United States Court of Appeals for the District of Columbia, entered on November 30, 1942, (R. 81). Timely petition for a rehearing was denied on December 22, 1942, thus making it a final judgment for the purpose of this petition.

QUESTIONS PRESENTED.

1. Did the lower court in passing upon the question of the custody of children residing in the District of Columbia, err in failing to go behind the interlocutory order of the North Carolina Court as to their custody?

2. Did the lower court err in holding itself "bound" by the North Carolina Order, and in giving to it the effect of *res judicata,* when such order, is not such a final order so as to be entitled to full faith and credit under the Federal Constitution?

3. Is it not a violation of Due Process of Law in failing to give petitioner a full hearing on Writ of Habeas Corpus, when the lower court erroneously concludes it is bound to give full faith and credit to a judgment which is not entitled to full faith and credit under the Federal Constitution?

4. Is it not a violation of Due Process of Law, in denying the petitioner the right to rebut the statements of the respondent at the hearing upon the Writ of Habeas Corpus, in which she alleged that she was a fit and proper person to have the custody of the children?

5. Is it not a violation of Due Process of Law in a matrimonial action, whether annulment, divorce, or separation, to award custody of non-resident children, especially when the court fails to enter a judgment or decree on the primary issue involved?

REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI.

(A) Since two or more courts of last resort are in dispute over the question involving the proper interpretation of the Due Process clause of the Federal Constitution, we submit that this Court should allow this Writ in order to decide the question. The several decisions in conflict by the United States Court of Appeals for the District of Columbia appear in the brief in support of this Writ. We, therefore, submit that this Court should accept this case to clarify the law.

Petitioner respectfully submits, that he has been denied due process of law as guaranteed by the 5th Amendment to the Constitution of the United States, because the lower court erroneously gave the effect of *res judicata* to a decree of North Carolina which was not entitled to full faith and credit. By thus erroneously giving full faith and credit to an interlocutory decree, your petitioner has been deprived of a full opportunity to be heard, and of his day in court, as are requisite to the due process as is guaranteed by the Federal Constitution.

The decision of the lower court expressly states that the petitioner was deprived of his right to a full and complete hearing, but justifies such deprivation upon an erroneous theory of *res judicata.*

It is our contention, that giving the effect of full faith and credit to a judgment which is not entitled to such is a denial of due process. The refusal of the trial court to permit petitioner to go behind the North Carolina Order, and to introduce evidence concerning the character and fitness of the respondent to be custodian of the children, (residents of the District of Columbia) or her actions prior to the North Carolina Decree, was a denial to petitioner of a substantial right, and was vital to sustain his answer denying the fitness of the respondent to be a proper custodian for the two children. The question is a substantial one,

and it is most desirable that this Court determine whether a Federal Court may so limit a litigant in his proof so as to deprive him of due process, and justify such denial on an erroneous application of the full faith and credit clause of the Federal Constitution.

(B) It is our further contention, that the petitioner was denied due process of law, when the trial court refused to allow him to rebut the statements of this respondent made in her petition for a Writ of Habeas Corpus, wherein she stated, and put in issue, that she was a fit and proper person to have the custody of the children. The court erroneously rejected such testimony offered by the petitioner, upon the ground that the issue was *res judicata,* and that the court had to give full faith and credit thereto. Such is not correct, as the issue was not *res judicata,* nor did the court have to give full faith and credit thereto, since the North Carolina Order was not a *final* decree.

(C) It is our further contention, that the petitioner was denied due process of law in not being allowed to go behind the North Carolina Order when the record disclosed that the North Carolina Court had awarded custody of the non-resident children, when the primary issue involved a divorce and no order or decree was entered granting or denying a divorce. Therefore, the respondent had no standing in court as the court had no authority to grant custody to the respondent unless a divorce was granted. When no divorce was granted, the court lost jurisdiction of the case. Therefore, if the North Carolina court had no jurisdiction to award custody, there is no reason why the District Court on Petition for Habeas Corpus should give full faith and credit to a void order of a State Court; and by erroneously giving full faith and credit, the petitioner was denied his due process of law.

Wherefore, your petitioner respectfully prays that this Court issue a Writ of Certiorari, to the United States Court of Appeals for the District of Columbia, to certify

and send to this Court a full and complete transcript of the record herein, to the end that the cause may be reviewed and determined by this Court as provided by law, that the judgment or order may be reversed with costs and for such other and further relief as may be appropriate.

STUART H. ROBESON,
Investment Building,
Washington, D. C.,
Attorney for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. —.

DANIEL F. BOONE, *Petitioner,*

v.

MARTHA LIGHTNER BOONE.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The opinion of the U. S. Court of Appeals for the District of Columbia is reported in 76 Appeals D. C. ....., Fed. (2d) (Adv. sheets) (R. 81-82).

JURISDICTION.

The petitioner contends he is entitled to have the opinion of the U. S. Court of Appeals for the District of Columbia reviewed by virtue of Section 237 (b) of the Judicial Code as amended, since,

(1) He has been denied a question of substance which has resulted in a denial to him of due process of law as guaranteed by the 5th Amendment to the Constitution of the United States.

(2) The lower court has erroneously decided a question of substance relating to the construction of the Constitution by giving effect to a judgment under the full faith and credit provision of the Federal Constitution and which judgment is not entitled to such full faith and credit.

This court has held that when the effect of res judicata is challenged for want of due process then certiorari will be granted. Thus, in the case of *Hansberry* v. *Lee,* 311 U. S. 32 this court stated:

> "But when the judgment of a state court, ascribing to the judgment of another court the binding force and effect of res judicata, is challenged for want of due process it becomes the duty of this court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the constitution prescribes."

While the 14th Amendment to the Constitution guarantees Due Process by state courts, nevertheless, the 5th Amendment guarantees similar process in Federal Courts. The lower court in this case is a Federal Court and is accordingly bound by the guarantees of the 5th Amendment.

In re: *Fayerweather* v. *Ritch,* 195 U. S. 276, this court stated that where one court by giving unwarranted effect to a judgment of another court, has deprived a person of his property without due process of law, the application of the Constitution is involved and this Court has jurisdiction on appeal.

SPECIFICATION OF ERRORS TO BE URGED.

1. The lower court erred in failing to go behind the interlocutory order of the North Carolina Court.

2. The lower court erred in holding itself "bound" by the North Carolina Order and in giving to it the effect of res judicata, when such order is not a final order so as to be entitled to full faith and credit under the Federal Constitution.

3. It is a violation of Due Process of Law in failing to give petitioner a full hearing on a Writ of Habeas Corpus when the lower court erroneously concludes it is bound to give full faith and credit to a judgment which is not entitled to full faith and credit under the Federal Constitution.

4. It is a violation of Due Process of Law in denying the petitioner the right to rebut the statements of the respondent in the Writ of Habeas Corpus in which she stated that she was a fit and proper person to have the custody of the children.

5. It is a violation of Due Process of Law in a matrimonial action, whether annulment, divorce, or separation, to award custody when the court fails to enter a judgment or decree on the primary issue involved.

SUMMARY OF ARGUMENT.

The opinion of the Court below states that the trial court was correct in giving the effect of res judicata to the North Carolina Decree. There is no question but that the trial court did give the effect of res judicata to the North Carolina Order, since the trial court stated that he "was bound by the terms of the final judgment" of the North Carolina Court.

It is elementary that a judgment must be final and conclusive in order to come within the full faith and credit provision of the Federal Constitution. The North Caro-

lina decree is not a final decree and is not entitled to full faith and credit. It is apparent from the record that the court below considered the judgment of the North Carolina Court as being final and conclusive and, accordingly, entitled to full faith and credit under the Federal Constitution (R. 23, 31, 32). The trial court stated in his Conclusions of Law that he was "bound by the terms of the final judgment" of the North Carolina Court (R. 26). *However, the judgment here sued upon was not and is not final or conclusive.*

The North Carolina judgment *upon its face lacks the necessary* ingredients of a final judgment so as to be entitled to full faith and credit under the Federal Constitution, since:

1. The principal issue in the North Carolina action (divorce) *is still pending FOR trial.*

2. The North Carolina Order itself states that the cause "is retained for further orders" and therefore is not final.

ARGUMENT.

It is elementary law that a judgment must be final and conclusive in order to come within the full faith and credit provision of the Federal Constitution (Article IV, par. 1, sec. 1).

The most recent case on this point in the District of Columbia is the one of *Operative Plasterers and Cement Finishers International Association of the United States and Canada* v. *Case,* 68 App. D. C. 43. That court reaffirmed the well established rule in the following language:

> "The instant suit upon a North Carolina judgment is brought in the District Court of the United States for the District of Columbia under the full faith and credit clause of the United States Constitution providing that:
>
> " 'Full Faith and Credit shall be given in each state to the * * * Judicial Proceedings of every other State.'

"Under that clause the courts of one state need give no greater effect to a judgment of the courts of another than that judgment has in the latter; *for example, if a judgment is inconclusive in a state where rendered, it is equally inconclusive in a sister state.*" (Italics supplied).

In *Barnes* v. *Lee,* 128 Or. 655, 275 P. 661, the court stated:

"We refrain from a consideration of the testimony brought out in this case, as it would serve of no useful purpose, and, in our opinion, there is only one question to be settled, and that is, under all considerations, what is best for the child? We do not feel ourselves bound by the decree of the Oklahoma court in either of the proceedings mentioned, as neither was final, but in both instances the custody was only granted '*subject to the further order of the court*', and while the judgment is a finality, which the courts of this state must respect as to the divorce, it is not such a final judgment as the courts of this state are bound to carry out as to the custody of the child. *In any event such a decree is only advisory.* A decree in a divorce proceeding, which grants to one of the parties the custody of a child *subject to the further order of the court,* while it may be a final decree for the purpose of an appeal, is not a final decree within the 'full faith and credit' clause of the Constitution of the United States, so far as the question of custody is concerned, when raised in a State other from that in which the decree was rendered." (Italics supplied)

In the well considered case of *People Ex Rel Multer* v. *Multer,* 175 N. Y. S. 526, the same question arose upon a habeas corpus proceeding to determine the right of the relator to the custody of an infant seven years of age.

In that case the relator based his right to the custody of the child upon a judgment or order made by the Probate Court in the State of Massachusetts. A Massachusetts statute gives the Probate Court power to make decrees relative to the care, custody, education, and maintenance of infant children, and to determine which of the parents of such children shall be entitled to such custody.

The Probate Court in Massachusetts had signed an order "that said Virgilio Multer have custody and possession of said minor child *until the further order of the court,* * * *".

It was the contention of the relator in that case that the said order was of such a character that it came within the full faith and credit requirement of the Federal Constitution. The defendant, on the other hand, contended that the order was merely interlocutory and therefore not entitled to such full faith and credit. The court in that case stated as follows:

> "No question becomes res adjudicata until it is settled by a final judgment, and has no application to an interlocutory order. I am convinced that the defendant's contention is correct. The authority of the Probate Court is that it 'shall determine which of the parents of such children shall be entitled to such custody in accordance with the law relative to the custody of children whose parents have been divorced'. * * * It thus appears that the Probate Court was without power to make a final decree and for all time fix the status of the child."

In the leading case of *Lynde* v. *Lynde,* 162 N. Y. 405, 56 N. E. 979, it appears that an action was brought upon a final decree of the Court of Chancery of the State of New Jersey which adjudged that the plaintiff was entitled to recover a certain sum which had accrued for alimony, and further requiring the defendant to pay permanent alimony at the rate of eighty dollars ($80.00) per week.

The New York Court of Appeals in a review of the law under consideration states:

> "With respect to how far the Supreme Court of this state will enforce the final decree of the New Jersey Court, I think the determination of the Appellate Division to be quite correct. The action was to recover upon a final decree of the court of another state, which, being rendered with jurisdiction over the person of the defendant, is to be deemed conclusive, in so far as it adjudged the defendant to be indebted to the plaintiff

> at the date of its rendition. * * * So far, as it made provisions for the payment of alimony in the future, it remained subject to the discretion of the Chancellor and lacked conclusiveness of character. The Chancellor's action was not final on the subject. As he observed in referring to the laws of New Jersey; 'the statute exhibits an intention that the subject shall be continuously dealt with according to the varying conditions and circumstances of the party'. *The provision of the Federal Constitution, which requires that full faith and credit shall be given to judicial proceedings of another state, in my opinion should be deemed to relate to judgments, or decrees, which not only are conclusive in the judisdiction where rendered but which are final in their nature.*" (Italics supplied)

In the case of *Crayne* v. *Crayne,* 54 Nev. 205; 13 P. (2) 222, decided on August 4, 1932, the court stated:

> "It is well settled that the doctrine of res adjudicata is available only after a final decree has been entered. * * * The prevention of the retrial of such litigated points in another action is the purpose of the full faith and credit requirement of the Federal Constitution, and that purpose would be largely frustrated if anything short of a final judgment were permitted to prove a bar to an action upon the principle of res adjudicata. Interlocutory orders or judgments will not, therefore, operate as res adjudicata."

In the case of *Cooke* v. *Cooke,* 67 Utah 371; 248 P. 83, it appears that a Canadian Court awarded custody of a child to the husband "to remain in his care and custody until the court or judge shall make other order to the contrary." The Utah Court in that case held that this was merely an interlocutory order and that by the same principle, which precluded that court from giving full faith and credit to such an order, they refused to extend the Doctrine of Comity to said order. The Utah court in that case stated as follows:

> "While the full faith and credit clause of the Constitution applies only to judicial proceedings of other

> states, yet, under the Doctrine of Comity, we are not required to give greater effect to an order or judgmen of a foreign country than we would to that of a sister state; and on principle there is no good reason why we, under such doctrine should give greater effect to an interlocutory order of a foreign country than the court in which it is rendered could itself give it."

It is interesting to note that the Utah court in reaching its decision in the *Cooke case, supra,* followed and cited the decisions of *Lynde* v. *Lynde, supra, People Ex Rel. Multer* v. *Multer, supra,* and *Heavrin* v. *Spicer,* 48 App. D. C. 337, 265 F. 977.

In the case at bar the North Carolina order expressly states that "the cause is retained for further orders". The judgment is therefore not "final and conclusive" upon the North Carolina Court which rendered it, or any other Court.

The North Carolina Court has authority and power to revise or modify the judgment of custody. Since the judgment is not even binding or final upon the court that rendered it, it is much less binding upon the courts of the District of Columbia.

As the North Carolina Court Did Not Pass on the Question of Divorce, It Had No Power to Make Any Order as to Custody. The proceeding in North Carolina was one for absolute divorce. No divorce has ever been granted and no reference to a divorce is made in the order of the Judge awarding the children to the respondent. It has been repeatedly held that in a matrimonial action, whether annulment, divorce, or separation, the court is powerless to award custody when it fails to enter a judgment or decree on the primary issue involved.

In the case of *Towson* v. *Towson,* 49 App. D. C. 45, the Court stated that in a suit by the wife for a limited divorce, where it found her allegations not sustained by the evidence,

then it is without power to award her the exclusive custody of the children or permanent alimony. In its opinion that court cites the leading New York case of *Davis* v. *Davis*, 75 N. Y. 221, as follows:

> "* * * It would be an anomaly in legal proceedings to allow a complainant, who had failed to establish a claim to the principal relief sought, to have a decree against the defendant for the mere incidents of that relief.
>
> "* * * In this case, the plaintiff by her suit invoked the jurisdiction of the court to grant her a separation under statute. She failed to make a case for divorce and the defendant was, we think, entitled to a judgment of dismissal. *The court was not authorized in this action after having denied judgment of separation to award the plaintiff the custody of the children.* * * *" (Italics supplied)

In *Finlay* v. *Finlay*, 240 N. Y. 429; 148 N. E. 624, Mr. Justice Cardozo said:

> "The statute permits a judgment fixing the custody of children *as an incident to a judgment for divorce or separation. If a divorce or separation is refused, jurisdiction is not retained to adjudicate the incident upon the failure of the principal.* Relief must then be sought, not in the statutory action for divorce or separation, but by recourse to other remedies." (Italics supplied)

In *People ex rel. McCanliss* v. *McCanliss*, 255 N. Y. 456; 175 N. E. 129, (decided February 10, 1931), the Court of Appeals, speaking through Mr. Justice Cardozo observed:

> "For all that we can know at this time, the husband, when he proceeds to the trial of the action of annulment, will fail in his attempt to invalidate the marriage. If his complaint shall be dismissed, *there will be no power in that action to adjudicate the custody.*" (Italics supplied)

In *Fein* v. *Fein*, 261 N. Y. 441; 185 N. E. 693, (decided April, 1933) which was an action for separation, the Court of Appeals held that, where neither party was granted a

decree of separation, the trial court was wholly without power to make any custody award.

And in the case of *Rosenberg* v. *Rosenberg*, 241 N. Y. App. Div. 411, 272 N. Y. S. 789, the Court said in part:

> "But having dismissed the complaint, the court had no authority to make any direction concerning alimony or the custody and support of the children of the parties."

In the action at bar the North Carolina court said nothing about a divorce, but nevertheless granted the custody of the children to the wife in the same action, and clearly violated the principle that "jurisdiction is not retained to adjudicate the incident upon the failure of the principal."

CONCLUSION.

In conclusion, we rest this case on the grounds that the lower court denied the petitioner due process of law in its failure to go behind the interlocutory order of the North Carolina Court. The North Carolina decree is not *res adjudicata,* since the case "is retained for further orders" by that Court. Therefore, if the order is not final, the petitioner was denied due process of law when the trial Court below held itself bound by the fact that the North Carolina order was *res adjudicata* and therefore entitled to full faith and credit under the Federal Constitution. We contend that this is giving a man a trial without the right to speak, a trial in which he is condemned without offering a defense, a trial without any of the elements of justice and fairness.

We further contend that it is a violation of due process of law to allow the respondent to raise an affirmative statement in her Habeas Corpus petition that she is a fit and proper person and not allow the petitioner the right to rebut that statement. It allows one to raise a question which can be rebutted without giving the petitioner a right to rebut. This

is the same principle of a trial without the rigth to speak.

And finally we conclude that the District Court had no jurisdiction to hold itself bound by the North Carolina decree when the case involved was a divorce action which was never granted, since the North Carolina decree awarded custody of the minor children. This is the same effect as giving the court authority to try all embracing facts not relevant to the primary issue. The only way that the North Carolina Court could have retained jurisdiction in this case was to grant an absolute divorce to the petitioner, but when the North Carolina Court failed to grant this divorce action to the petitioner, it lost jurisdiction in the case before it to award custody of the minor children and when it did proceed to award custody of the minor children, such judgment or decree was null and void and certainly did not have extraterritorial effect and certainly did not come within the purview of the Federal Constitution whereby such judgment would be entitled to full faith and credit in a sister state.

Therefore, we submit that this Court should grant a Writ of Certiorari so that the petitioner may have a fair and impartial trial and all the facts for the best interest of the children can be brought before the court.

Respectfully submitted,

Stuart H. Robeson,
Investment Building,
Washington, D. C.,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 979

DANIEL F. BOONE,

Petitioner,

vs.

MARTHA LIGHTNER BOONE.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

M. Ryan McCown,
Louis M. Denit,
Counsel for Respondent.

J. E. Shipman,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 979

DANIEL F. BOONE,

Petitioner,

vs.

MARTHA LIGHTNER BOONE.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The respondent respectfully submits to your honorable court the following brief in opposition to the petition for a writ of certiorari:

Statement of Matter Involved.

The petitioner, Daniel F. Boone, and the respondent, Martha Lightner Boone, are husband and wife. They have two children, Daniel Lightner Boone, born May 23, 1935, and Martha Penelope Boone, born September 14, 1938. The petitioner and respondent lived together as man and wife in the State of North Carolina until April 13, 1939, when they separated (R. 6).

On April 16, 1941, the petitioner commenced an action in the Superior Court for Forsyth County, North Carolina, against the respondent and filed his complaint alleging the marriage of the parties; their separation on April 13, 1939; that petitioner was, and for more than a year immediately preceding the commencement of the action had been, a resident of the State of North Carolina, and that the custody of the two children of the marriage had been settled by a written agreement (R. 6-7). There was nothing in the complaint about either the petitioner or the children residing in the District of Columbia. The petitioner asked for a divorce from the respondent on the statutory ground of two years separation (R. 7).

The respondent filed answer on May 9, 1941, admitting the allegations as to the marriage and separation of the parties, and that both were residents of North Carolina. As to the separation agreement and the provisions of the same regarding the custody of the children, the respondent alleged numerous acts on the part of petitioner amounting to a breach, and failure to live up to the provisions of the same, and asked the court to adjudicate the custody of the children (R. 8-11).

The case was regularly calendared for trial in Forsyth County, North Carolina Superior Court on June 23, 1941, and the trial commenced on that day and continued until June 24, 1941, when it was continued until July 1, 1941 and concluded on July 2, 1941, at which time a judgment was signed awarding the custody of the two children to the respondent (R. 12-14). The petitioner gave notice of appeal to the Supreme Court of North Carolina but failed to perfect the appeal in accordance with the rules of that Court. To remedy this failure the petitioner filed a petition in the Supreme Court for a writ of certiorari, and upon a denial of the same filed a petition for a rehearing. After this had been denied the respondent gave notice of a motion to dis-

miss the appeal, and after a hearing on said motion, with counsel for petitioner present and opposing, an order was entered on January 7, 1942, dismissing the appeal (R. 3-4). There is nothing in the present record to show the number of days leave of absence the petitioner had from his military duties, or that he had not completed his testimony, or that he advised the North Carolina Court that he changed his domicile after giving his testimony in which he had assured the court that he was a resident of North Carolina, but the record affirmatively shows participation in the proceeding until the final dismissal of the appeal.

After the dismissal of the appeal, the petitioner continued, in violation of the order awarding custody of the children to respondent, to keep the children in the District of Columbia. The respondent thereupon filed her petition for habeas corpus in that jurisdiction on February 5, 1942 (R. 2-14), and the petitioner filed his answer (R. 14-21).

The matter came on for hearing before Judge Bailey on March 5, 1942 (R. 29), and was concluded on March 9, 1942 (R. 23).

The court announced the decision favorable to the mother, set forth on page 22 of the record, and upon findings of fact and conclusions of law (R. 23-27) signed the order granting the writ (R. 27-28).

Upon appeal to the United States Court of Appeals for the District of Columbia the District Court judgment was affirmed (R. 81-82), and petition for rehearing denied on December 22, 1942, (R. 89).

Petition for a writ of certiorari was filed April 30, 1943.

Questions Presented.

1. Where the petitioner commenced an action for divorce in North Carolina on the grounds of two years separation, and alleged that both he and his wife were residents of that

state, and the wife by answer raised the question of the custody of the two children of the marriage, can the petitioner subsequently contend

(a) That the order of the North Carolina Court awarding custody of the children to the mother is void and not binding on him and on the children? (b) That he can relitigate in the Courts of the District of Columbia matters which were fully litigated in the North Carolina Courts? That he has been denied due process of law under the facts in this case?

Summary of Argument.

The argument of the respondent is briefly summarized as follows:

1. That the North Carolina Court had unquestioned jurisdiction of the divorce action and the right to award the custody of the children; that the matter was fully heard and custody of the children awarded to the respondent in accordance with North Carolina laws, and that the attempt on the part of the petitioner to change his residence during the trial in North Carolina and oust the jurisdiction of that court was ineffectual, and that the judgment of that court was rightly upheld in the District of Columbia on principles of comity, decision law, and under the full faith and credit provision of the Federal Constitution.

2. That the effect of the North Carolina judgment was correctly determined and applied in the courts of the District of Columbia in accordance with the local law in North Carolina.

3. That the petitioner's claim of a denial of due process of law is unfounded and the petition presents no question of substance under the provisions of Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925, and Rule 38, Section 5 (c) of this Court.

ARGUMENT.

Point 1.

The order of the North Carolina Court awarding custody was not an interlocutory order but was a valid judgment of the court, and binding on the husband, wife, and children who were before the court, as to all facts and circumstances at the time of its rendition.

The action in North Carolina was instituted by the petitioner. He voluntarily invoked the aid of the court. The matter cannot be better stated than in the language of the opinion of the United States Court of Appeals for the District of Columbia: "Though appellant now claims residence in the District, he does not contend that he committed perjury when he assured the North Carolina Court that his residence was in North Carolina. That Court had unquestioned jurisdiction of his divorce suit. That Court has jurisdiction pending a divorce suit, to settle the custody of children" (R. 81-82). The North Carolina cases cited state the law in that jurisdiction as follows:

In *State* v. *Duncan*, 222 N. C. 11, 21 S. E. (2d) 822, the Court said: (Quoting from *Story* v. *Story*, 221 N. C. 114, 19 S. E. (2d) 136, 137):"

> "Upon the institution of a divorce action the court acquires jurisdiction over any child born of the marriage and may hear and determine questions both as to the custody and as to the maintenance of such child either before or after the final decree of divorce. C. S. 1664; Tyner *v.* Tyner, 206 N. C. 776, 175 S. E. 144; Sanders *v.* Sanders, supra (167 N. C. 319, 83 S. E. 490).

Having invoked the jurisdiction of the North Carolina Court it is respectfully submitted that the petitioner cannot escape the finding of fact by the trial court, "that the

plaintiff, the defendant and the said children are residents of the State of North Carolina" (R. 12) or that of the District Court in the District of Columbia, "that the removal of said children and of respondent (petitioner) to said temporary residence in the District of Columbia did not affect or change the domicile of said respondent (here the petitioner) or said children in said Forsyth County, where the suit relating to the custody of said children was pending for hearings and decision, and where said suit was later brought to a hearing and decided on July 2, 1941" (R. 25).

While the petitioner made an elaborate effort to change his residence on June 23, 1941, after having testified that day that his residence was in North Carolina, it does not appear that he made this fact known to the court while he undertook step by step to appeal to the Supreme Court, to obtain a writ of certiorari, and after a denial filed a petition for a rehearing. Petitioner's participation and opposition continued in the North Carolina Courts until the final dismissal of his appeal before Judge Armstrong on January 7, 1942 (R. 3-4). It must be assumed that petitioner would have claimed the benefit of a favorable decree. Can he set at naught an unfavorable decree? We respectfully submit that he cannot.

The questions which the petitioner sought to litigate in the District of Columbia are clearly shown by the record to be the same questions which were before the North Carolina Court. There is no allegation that there are any new facts which were not brought out before the North Carolina Court where the judgment clearly indicates that petitioner had made charges against the character of his wife and had charged her with adultery (R. 13). The court ruled that the charges had not been established (R. 13). Upon what theory should the petitioner have been permitted to urge the same charges in the Courts of the District of Columbia? For litigants to present the same questions over and over

and ask for new decisions is contrary to all established rules of American jurisprudence.

The North Carolina Court, as shown above in the recent cases cited from the Supreme Court of that state, had the right either before or after the disposition of the divorce case to award the custody of the children. Under this rule vanishes the claim of any benefit by petitioner that "the principal issue in the North Carolina action (divorce) is still pending for trial" (Petitioner's Brief 12).

As to the benefit claimed by petitioner that the North Carolina order is not final, we disagree with the petitioner's position and respectfully submit the following authorities and reasons:

The principle established by the great weight of authority is to the effect that when an award of custody is made by a court of competent jurisdiction, such award is final and conclusive as to all matters involved, and comes within the full faith and credit clause of the Federal Constitution.

See cases cited in annotations in 20 A. L. R. 815, 72 A. L. R. 441 and 116 A. L. R. 1299.

In the case of *Rosenberger* v. *Rosenberger,* 95 F. (2d) on page 350, Justice Miller, writing for the court says:

> (1) "The general rule is that the authority of the court which first takes control of the subject-matter of litigation continues until it has finally and completely disposed of the matter, and no court of coordinate authority is at liberty to interfere with its action. Frazier *v.* Frazier, 61 App. D. C. 279, 61 F. (2d) 920, and cases there cited. See, also, Michigan Trust Co. *v.* Ferry, 228 U. S. 346, 33 S. Ct. 550, 57 L. Ed. 867; Slack *v.* Perrine, 9 App. D. C. 128, 153. Cf. dissenting opinion by Stone, J., Yarborough *v.* Yarborough, 290 U. S. 202, 213, 54 S. Ct. 181, 185, 78 L. Ed. 269, 90 A. L. R. 924.
>
> (2) Therefore, by retaining the cause for further orders, the North Carolina Court maintained its juris-

diction over the parties and subject-matter of the proceeding. It had authority to modify existing orders or enter new ones, respecting the support and care of the appellee, and to enforce such orders. The removal of the father's residence to the District of Columbia and the appellee's action in filing suit there did not oust the North Carolina Court of its jurisdiction. Slack *v.* Perrine, supra, 9 App. D. C. 128, at page 155. See, also, Michigan Trust Co. *v.* Ferry, supra; Burrowes *v.* Burrowes, 64 App. D. C. 392, 78 F. (2d) 742."

A careful reading of the case of *Barnes* v. *Lee,* 128 Oregon 655, 275 P. 661, cited by petitioner on page 13 of his brief, indicates that the Oregon Court is in accord with respondent's position both as to the question of res adjudicata as to all facts decided in the first trial and also on the proposition that the petitioner cannot obtain an advantage by his obvious attempt to change from one jurisdiction to another while violating the orders of the first jurisdiction. From page 662 (Pacific) we quote from the opinion:

"In the case of Griffin *v.* Griffin, 95 Or. 78, 84, 187 P. 598, 601, Justice Bean, speaking for the court, remarks:

'A judgment or decree of a court of one state awarding the custody of minor children in a divorce case is not res judicata in a proceeding in a court of another state, except as to facts and conditions before the court upon the rendition of the former decree.'"

From page 663:

"There was no disobedience of the order of the Oklahoma Court in Lee's coming to this state and bringing the child with him."

POINT 2.

The effect of the North Carolina judgment is determined by the laws of North Carolina and under the full faith and credit provision of the Constitution, and by comity, the local law in North Carolina was given recognition by the courts in the District of Columbia.

Decisions from the Supreme Court in North Carolina have been cited showing the law in that state regarding the right of its courts to award custody of children, either before or after the granting of a decree of divorce. The respondent contends that in applying the full faith and credit doctrine the North Carolina judgment is entitled to such faith and credit in every court within the United States as it has by law or usage in the state from which it is taken. Article 4, Section 1, of the Constitution: 28 U. S. C. A. 687, *Adam* v. *Saenger*, 303 U. S. 62, 82 L. Ed. 651. This was held in *Davis* v. *Davis*, 305 U. S. 32, 83 L. Ed. 26, as having been rightly interpreted by Congress to mean not some but full credit. It is conceded that this court has the right to determine what the law of North Carolina was and certainly the opinions quoted from the Supreme Court of that state are decisive.

It seems to us that the only position which the petitioner takes is that he desires to nullify and give no effect whatever to the North Carolina decree awarding custody, although he invoked the jurisdiction of that court.

POINT 3.

There is no question of substance presented under Section 237 B of the Judicial Code and applicable rule of court.

The petitioner claims that due process of law has been denied to him although he does not dispute the extent of his participating in the North Carolina litigation. Merely

to state the facts is to show that petitioner's position is untenable. There is nothing in the record to justify petitioner's contention that the District Court failed to grant him a full and and complete hearing. All that the District Court did was to refuse to permit old charges to be related after the said charges had been disposed of by the North Carolina order.

It is respectfully submitted that in the District Court the learned presiding Judge clearly had in mind the correct principles of law when he ruled at the beginning of the hearing as follows: "As I understand the law in this case, the judgment of the court in North Carolina is conclusive as to the situation as it existed at the time of that judgment. However, if it now appears that the interests of the children—and they are the only interests which the court should consider—requires any change in their custody, I think that the court has jurisdiction to make it" (R. 29).

On this proposition we submit that the United States Court of Appeals correctly ruled in writing as follows: "We think, therefore, that the District Court was right in holding itself bound, with respect to conditions at the date of the North Carolina court's order, by that court's findings. This is simply to say that we should not needlessly thresh over old straw, but should apply the doctrine of res judicata as far as the nature of the case permits" (R. 82).

In the case of *Ruhlin* v. *New York Life Insurance Company,* 304 U. S. 202, 82 L. Ed. 1290, referring to rule 38 (5) of the Supreme Court rules, Mr. Justice Reed writing for the court says on page 206 (1292 L. Ed.):

> "As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be

merely corollary to a permissible difference of opinion in the state courts."

In the case at bar, the principal thing before the District Court was to clearly interpret and give effect to the North Carolina judgment. There can be no doubt that this was correctly done and we respectfully submit that petitioner has failed to show error, or that the Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions. In fact, no such showing was attempted by the petitioner.

Conclusion.

The mother in this case has litigated in the courts since May 9, 1941, for the custody of her two children. The record clearly sets out the history of the litigation as it has proceeded through the courts. We respectfully submit that, from the record, the facts are inescapable that the petitioner, who invoked the North Carolina Jurisdiction, is merely attempting to avoid the result of the judgment there rendered and subsequently upheld in the Courts of the District of Columbia.

M. Ryan McCown,
Tryon, N. C.
Louis M. Denit,
719 Fifteenth Street,
Washington, D. C.,
Counsel for Respondent.

J. E. Shipman,
Hendersonville, N. C.,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 979.

DANIEL F. BOONE, *Petitioner,*

v.

MARTHA LIGHTNER BOONE.

PETITIONER'S REPLY BRIEF.

STUART H. ROBESON,
Investment Building,
Washington, D. C.,
Attorney for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITIONER'S REPLY BRIEF.

The respondent fails to discuss or even comment on one of the most important questions involved in this petition, namely, that the petitioner, at the outset of the hearing, was denied the right to introduce any evidence happening prior to the North Carolina decree affecting the character or reputation of the respondent. (R. 31-33.)

The Court of Appeals in its opinion found that the children were now in the District of Columbia and that its Courts may regulate their custody. (R. 82.)

The regulation of the custody of the children is, of course, based upon the fact that the children were actually bona fide residents of the District of Columbia, and had been since October, 1940. (R. 34.)

It would be a strange situation for the Chancellor, acting as *parens patriae* for bona fide resident children, in determining their custody, to feel that he was estopped from going behind a foreign interlocutory decree to determine their custody. Especially is this so when the record discloses that the children were bona fide residents of the District of Columbia, and had been for nine months before said decree.

It is believed that the law is as stated by the Court of Appeals in *Cook* v. *Cook*, decided on May 17, 1943, being No. 8419 in that Court. It states that (Opn., p. 3):

> "The children are now in the District of Columbia and the Court here not only has jurisdiction but owes the duty to protect them and to do the thing which appears to be best for them *without regard to anything any other court has previously done.*" (Italics supplied.)

The Court of Appeals in this decision in effect reversed its decision in the present case. For had the justice below admitted the testimony as to the actions and reputation of the respondent prior to the North Carolina decree the children would not have been awarded to her.

The United States District Court absolutely refused to hear any testimony as to the life, conduct and character of the respondent prior to the North Carolina decree. (R. 26, 29-33.)

The respondent devotes most of her brief to alleged facts before the North Carolina Court, and ignores the most essential points raised by the petitioner as to the proceedings in the United States District Court for the District of Columbia.

Wherefore, it is earnestly prayed that this Court grant the petition for certiorari in order that these innocent children, domiciled in the District of Columbia, can have the courts of their domicile investigate and pass upon the life,

habits and reputation of any person seeking their custody, regardless of what any other court may have said.

Respectfully submitted,

STUART H. ROBESON,
Investment Building,
Washington, D. C.,
Attorney for Petitioner.